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SOME HISTORICAL MATTER CONCERNING TRADE-MARKS.

MOST of the text books on the subject of trade marks begin with the case of *Southern v. How*,¹ and either expressly assert, or by implication convey the impression that trade marks are a comparatively modern thing,² when, as a matter of fact few human institutions can boast a more respectable antiquity. The use of trade marks dates from the very earliest times of which we have any knowledge.

The recent excavations in Asia Minor and in Egypt have revealed bricks bearing names which are supposed to be those of the manufacturers accompanied in many instances by devices.³ Roman bricks similarly marked have frequently been found. These inscriptions are of various kinds. In the days of republican brevity the date alone usually appears,—the initials of the consuls, sometimes the name of the maker. During the period of the Empire, there occurred also the names of the owners of the estate where the kilns were located, those of the owners or lessees of the factories, and those of the freedmen or slaves in charge of the work. In many cases the inscription is accompanied by a picture or a figure.⁴ It has been supposed that in addition to performing the function of a trade mark these names and devices indicate a governmental or official regulation.

Many of the ancient writers on architecture state that the best time for moulding sun-dried brick is in spring or autumn because during these seasons they dry evenly in all parts. In summer the heat drives off the external moisture and makes the brick appear fully dry before it is so in fact and eventually shrinks it sometimes resulting in cracks and spoiling the brick. A number of Roman writers on architectural subjects advised that bricks be kept from two to five years. In some places bricks could not be used in building until after the approval of a magistrate attesting that they had been moulded for five years. Whatever may have been the direct reason

¹ Popham, 144. Cro. Jac. 471, 2 Rolle 28, (22 or 32 Elizabeth, date doubtful.)

² For instance, in the *Encyclopaedia Britannica* title Trade Marks, it is said: "There seems no reason to doubt that the practice of employing a mark to denote the goods of a particular trader (not necessarily the manufacturer) grew out of the use of signs, which, first affixed to the dealers' shop, were afterward represented on his tokens and eventually placed on the goods themselves. Trade marks proper appear to have been in use in England in the reign of Elizabeth, etc."

³ Birch *Ancient Pottery*, London 1873, pp. 12, 17.

⁴ Geoffroy, *Roman Pottery Marks*, Paris 1886.

for these inscriptions, whether they were voluntary advertising, or the result of governmental regulation the fact remains that from a very early date they were used exactly as trade marks are today, to indicate the origin of the article.

The Greeks marked their works of art with the name of the sculptor. Greek pottery from the earliest times has borne inscriptions, usually the name of the maker and on decorated pieces the name of the decorator. The cup handles from the Ceramicus of Athens beside the maker's name often bore real trade marks such as figures of Mercury staffs, oil jugs, bees, lions' heads, and the like.⁵ Greek inscriptions have been found on Etruscan vases dated from 800 to 400 B. C. This has suggested the question whether these vases were truly a Greek product, or whether the Etruscan potter had copied the trade mark of some celebrated Greek maker, as the Roman engravers and sculptors were in the habit of doing in later times.⁶

Marks upon goods were in very general use among the Romans. Wherever exist relics of Roman life, from Syria to Britain are found the names of workmen, of manufacturers and of traders, pictorial marks, marks of local origin and chronograms. It is hardly too much to say that trade marks played almost the same part in Ancient Roman commercial life as they do today.⁷

The Italian stone cutters' marks go back to very early times. They are found in the ancient Roman city walls, in the buildings of the Palatine, and upon the stones of the walls of Pompeii.

It has been possible to compile what is believed to be a fairly complete list of Roman lamp makers from the names and trade marks found upon fragments of clay lamps.⁸

The inscriptions found upon lamps consist of simple trade marks, the names of makers, or of places and towns where they were fabricated, that of the pottery or of the proprietors, the date of manufacture, dedication to deities, the acclamations used at the public games, events or facts. Of the first class are the little marks used by the potter, either instead of his name, or in conjunction with it. There is no very great variety of symbols, and those found are of the simplest kind, such as circles, half-moons, the print of a human foot, wheels, palm branches, or the vine leaf. Although

⁵ Kohler. *Das Recht des Markenschutzes*. Würzburg 1884; Perrot & Chipiez, *Art in Primitive Greece*, Vol. I, p. 442; *History of Art in Persia*, p. 70 n. Birch *Ancient Pottery*, 322, 335.

⁶ *Encyclopaedia Britannica*, 140.

⁷ Kohler, *Das Recht des Markenschutzes*.

⁸ Birch *Ancient Pottery*. London 1873, p. 519, list in appendix p. 603, Kohler 34, Geoffroy, p. 11; *Inscriptions on Greek lamps*, see Birch 132.

the inscriptions relating to the fabric of lamps are by no means so numerous or complete as those upon tiles, yet they are instructive with regard to the potteries. A considerable portion only indicate that they were made by slaves, since they bear single names, such as Agatho, Attius, Arion, Aquilinus, Cinnamus, Bassa, Bagradus, Draco, Diogenes, Heraclides, Fabrinus, Fortis, Faber, Faustus, Inulucos, Memmius, Monos, Maximus, Muntripus, Nereus, Op-pius, Primus, Priscus, Pastor, Publius, Probus, Rhodia, Stephanus, Successivus, Tertullus, Vibianus, Victorinus, and Vitalis. These names generally occur in the genitive, the word *officina*, "manufacture" or "factory," being understood. One rare specimen has "Diogenes fecit," and several makers used *f.* for *fecit* after their names.⁹

Such marks are not peculiar to pottery, but are found on lead pipe and marble, on bronze instruments, upon gold, silver and iron articles, upon knives and gems.¹⁰ Bread was also stamped, as shown by a broken piece found in Pompeii. The Roman oculists sent their eye salves all over the known world. The dry cakes were often stamped with the name of the physician, the formula and directions for use. These marks were placed not only on solid remedies, but on earthen vessels containing liquids. Specimens of these ancient patent medicines have been found in England, in France and in Germany.

The origin of wine was marked on the jars, and the famous cheese of Etruscan Luna was marked with the picture of the city.

Signs for inns and shops were as well known as they are now. There was the elephant Inn in Pompeii with the sign of the elephant and the words "*Hospitium hic locatur triclinium cum tribus lectis et com (modis).*" (An inn with a dining room with three comfortable couches.)¹¹ On the tangs of the Norse swords of the early iron age frequently found in the mosses of Schleswig are the names of the armorers.¹²

Dr. Kohler,¹³ speaking of the use of trade marks in ancient Rome, says:

"All of this shows us a side of Roman commercial life which is often overlooked by legal historians; Roman commercial relations, although resting on different principles, were

⁹ Birch Ancient Pottery 519.

¹⁰ Roman Pottery Marks Geoffroy; History of Art in Phoenicia and Judea; Perrot and Chipiez, Vol. I, p. 96 and note 3.

¹¹ For the Evolution of Inn and business signs and their history, see Larwood and Hotten, "History of Signboards," London 1866.

¹² II. Encyclopaedia Britannica p. 555.

¹³ Kohler, pp. 38, 39, 41.

not, in their results, as different from our own as has been generally supposed; the Roman world in the time of the empire was penetrated by the same general impulses of trade as today. 'These manufacturers' marks are no singularity; they are connected with the same system of marking that is known in modern trade.'

* * * * *

"It is not our purpose to mention the particular works antiquity presents to us and to draw from them the information which they furnish upon the history of ancient manufacture and trade. It is not our purpose to specify the particular marks which show how ancient commerce grew and decayed, how it extended itself in widening circles, and finally again contracted into narrow limits. Neither need we mention the great help furnished by chronograms in ancient political history and in the history of ancient buildings and architecture. Our object was only to demonstrate that the whole institution in ancient times was no exception; that it was an institution of the first rank, and one which covered the whole territory of the ancient civilized world. It is, however, doubtful whether this institution of commerce ever became a system of established law, and whether it did not rely upon commercial honesty and integrity rather than upon the law."

* * * * *

"That no trace of such an action is found in the commentaries of the Roman jurists is not surprising considering the fragmentary condition of those commentaries at present, especially as it is certain, from existing writings and inscriptions, that there were many legal institutions of the Roman Empire, concerning which we have no juristic commentaries. Jurists and schools of jurists have their prejudices, and there are institutions which have been favored or neglected in juristic commentaries, from purely artificial reasons. A nation is always richer in legal institutions than is indicated by its legal and judicial writings, however full and complete they may be. It would not be the less certain, that there existed manufacturers' marks and a system for their protection in Rome, if we had the originals of the Roman jurists' writings before us, instead of the compilers' extracts of them, and if we found nothing on the subject in them."

During the middle ages it was a common practice to mark upon artistic productions the name, monogram or device of the artist or workman. The practice of signing paintings is an example. Not

only was this the case, but such monograms were protected against infringement. A decree of the Council of Nuremberg in the year 1512 provides "*Whereas*, a certain foreigner, who sells engravings under the Council Chamber, has, among others, certain ones bearing the signature of Albrecht Dürer,

Now, THEREFORE, it is ordered that he shall obliterate all such signatures, and keep no more such engravings in future, and if he shall neglect so to do, he shall be brought before the Council for fraud."¹⁴

In France trade marks were in use from the very earliest times. They were regarded as property and protected against infringement by civil remedies.¹⁵

As early as the thirteenth century, the copying of valuable marks became so common and so injurious that infringement was made a misdemeanor and in some cases even a felony and was punished in the barbarous manner characteristic of the times. The Elector Palatine in the Fourteenth Century issued an edict which, after reciting that the sale of spurious wine was the most outrageous form of deceit, punished by hanging any innkeeper who sold ordinary wine as Rudesheimer.¹⁶

An edict of Charles V. of May 16, 1544, concerning Flemish tapestries, provided that "any master workman who makes or causes to be made any such tapestry, shall work upon one end and upon the bottom of the said tapestry a mark or symbol, and such signs as the city may require; that it may be known by the said marks of what city and of what master the said tapestry is a product." Infringers were punished by cutting off the right hand.¹⁷ In France a royal edict of Charles IX in 1564 placed imitators of marks in the same category as counterfeiters who were punished capitally. This was subsequently modified by reducing the punishment to the galleys. Other similar edicts were issued, notably the statutes protecting the drapers of Carcassone (1666), which imposed the penalty of the pillory on infringers.

By ordinance of Amiens (1374), every smith was required to place a mark "different from any other" upon his metal work, "so that * * * it may be known who made it."

¹⁴ Putnam. II. Books and their makers 409; Thausing Life of Durer 254.

¹⁵ Lucien Brun, *Marques de Fabrique*, Paris 1897, Introduction.

¹⁶ Report of M. de Marafy to the Congress of Industrial Property. Paris 1878, p. 83.

¹⁷ Lucien Brun, (Introduction); Kohler, 50: "An edict of the magistrates of Brussels, 1525, established a system of protection for the originators of new tapestry designs; and in 1528 another edict required that each piece of a certain size should bear, on one side, the mark of the maker, and on the other, that of the city."

There was a similar ordinance of about the same date in Abbeville.

The same duty was required of goldsmiths (1376), of weavers (fifteenth century) and of calenders (1518). Imitation of these marks was punished.

These acts seem to have been special, applying only to particular trades and resulted in the anomaly of making infringement when committed in one trade a felony and in another only a civil wrong.¹⁸

In France, at least as early as the fourteenth century, each workman had his mark, with which he was required to mark his products. It was not optional, but obligatory, for the purpose of showing who was responsible for the work. In addition to this private marking, there was the public stamping after inspection and approval. As a corollary, a member, for example, of the corporation of mercers was required to promise 'not to lend his mark to any one whatever, to keep open shop,' etc. Such lending of a mark was declared to be a violation of good faith and of the public ordinances in relation to marks.¹⁹ This is the present law. It was said in a leading case:

"If the legislature and the courts are thus sedulous to protect the rights of individuals in respect to their own inventions, labels, and devices, it would seem to be implied that such individuals should not themselves attempt or allow any imposition upon the public by the false and fraudulent use of such labels, devices, or names, or inventions, for the sale of spurious or simulated articles. The fact that the defendant contracted to purchase, and the plaintiffs to sell a large number of empty papers, or bags, for seeds, with the plaintiffs' labels thereon, implied, as was doubtless the fact, that the plaintiffs had acquired a high credit with the public for the good qualities of their seeds, and that their labels upon bags or papers of seeds would secure for them a ready sale and at appreciating prices. Money received by the defendant in the sale of the seeds he was to put in these bags and papers sold to him by the plaintiffs, would be money obtained by deceit and fraud, if not by false pretenses. Perhaps the provision in the contract, that the defendant should fill the bags with seeds of a good quality, might save the parties from a conviction for a conspiracy to commit an act 'injurious to trade or commerce,' under subdivision 6, of section 8, chapter 1, of part 4, of the Revised Statutes. But if it be a crime to counterfeit labels, words, or devices previously appropriated

¹⁸ Lucien Brun, Introduction.

¹⁹ Kohler, p. 48.

to distinguish property, or to vend goods thus stamped, without disclosing the fact to the purchaser, it is equally an offense against the spirit of the law, equally injurious to trade and commerce and equally an imposition upon the public, to palm off spurious goods under cover of genuine labels and devices. Contracts to do this are clearly against public policy and should not be upheld and enforced by the courts. The demurrer in this case to the second cause of action—as the consideration is entire—is well taken, and the decision of the special term should be reversed.”²⁰

It is known that during the fifteenth and sixteenth centuries, workers in metals, weavers of tapestries, paper makers, publishers, printers, smiths, tanners and armorers had and used trade marks.

The use of trade marks by printers was the inevitable consequence of the conditions which resulted from the absence of any notion of property in literary work.

For many years after the invention of printing there was nothing which corresponded to the copyright laws of more modern times. Original contributions to literature were few, what was new was suspected of being heretical and not to be encouraged. The books of the day consisted almost entirely of the Greek and Latin classics and the writings of the fathers of the church. The end sought was not originality but accuracy and the publication of such works as these presented many difficulties in the securing of trustworthy texts from more or less doubtful manuscript and in educating compositors correctly to put such texts into type. The work of the reviser and proof reader under such circumstances demanded a very high standard of scholarship and a wide range of knowledge. Erasmus himself acted in this capacity for Aldus of Venice and Froben of Basle.²¹ Such printer-publishers as Aldus acquired a great reputation for the accuracy of their texts. Monograms and devices of various kinds were used to identify as theirs the books that they published. The dolphin and anchor of Aldus, the representation of a printing press of Badius and the monogram of Caxton are familiar examples. There being no copyright protection other publishers pirated the literary contents of the works with impunity, but not being content with this copied the trade marks of the publishers. In the preface to Aldus's *Livy* (1518) there appears this warning:

“Lastly, I must draw the attention of the student to the fact that some Florentine printers, seeing that they could

²⁰ *E. D. Smith, J. in Bloss v. Bloomer* (1857) 23 Barb. 604; *Medicine Co. v. Wood*, 108 U. S. 218; *Partridge v. Menck*, 2 Barb. Ch. 101; *Bulte v. Igleheart*, 137 Fed. 492.

²¹ *I Putnam, Books and their makers in the Middle Ages*, p. 427.

not equal our diligence in correcting and printing, have resorted to their usual artifices. To Aldus's *Institutiones Grammaticæ*, printed in their offices, they have affixed our well-known sign of the Dolphin wound round the Anchor. But they have so managed that any person who is in the least acquainted with the books of our production, cannot fail to observe that this is an impudent fraud. For the head of the Dolphin is turned to the left, whereas that of ours is well known to be turned to the right."

This form of trade piracy seems to have been a common practice. Benedict Hector of Bologna, cautions buyers of his "*Justinus et Florus*:"

"Purchaser, give heed when you wish to buy books issued from my printing-office. Look at my sign, which is represented on the title-page, and you can never be mistaken. For some evil-disposed printers have affixed my name to their uncorrected and faulty works, in order to secure a better sale for them."

And Jodocus Badius of Paris, gives a similar warning:

"We beg the reader to notice the sign, for there are men who have adopted the same title, and the name of Badius, and so filch our labour."²²

The abuse became so prevalent that in the regulations of the Milanese Printers Guild, there appeared the following: "No printer or dealer must use for his sign a token identical with or closely similar to that already in use with an authorized printer or dealer."²³

That these symbols were regarded as valuable property is evident from the fact that it is said of Reynold Wolf, whose sign was a Brazen Serpent, "His trade was continued a good while after his demise by his wife Joan, who made her will the first of July, 1574, whereby she desires to be buried near her husband in St. Faith's Church, and bequeathed to her son, Robert Wolf, the chapel house, (their printing office), the Brazen Serpent, and all the prints, letters, furniture, etc."²⁴

In the German and Italian trade guilds of the middle ages, as in France, the use of marks was usually compulsory; the member was not only permitted but was compelled to use his mark so as to strengthen the hold of the guild upon the trade. Dr. Kohler quotes a statute of Parma which is a more compact and adequate piece of

²² Larwood and Hotten "History of Sign Boards," London 1866, pp. 6, 7.

²³ I Putnam, *Books and their makers in the Middle Ages*, p. 453.

²⁴ Ames *Typographical Antiquities* Dibdin's Ed., London 1819, Vol. 4, p. 6.

legislation than the Trade Mark Act at present in force in the United States.

"A chapter for the protection of guilds and artisans in this state, and to prevent many frauds which are or may be committed upon them;—that no person in the trade or guild shall use the mark of any other person in such trade or guild, nor place such mark, or a similar one, upon knives or swords; and if any person in such guild has continuously used a mark upon knives, swords or other steel or iron articles for ten years, and any other person is found to have used, within one or two years, the same mark or an imitation thereof, whether stamped or formed in any other way, the latter shall not in future be allowed to use such mark upon knives, swords or other steel or iron articles, under penalty of ten pounds of Parma for each and every offense, and that regardless of any compromise or award of arbitrators which may have been made. Tenth session, 1282, Aug. 28."

It is curious that this statute contains a provision which was regarded as a dangerous innovation when it was introduced into the English trade mark act of 1875, and from there, in a modified form, into the United States statute of February 20, 1905. This is the so-called "old mark" section of the English act and the "ten year proviso" of our own, permitting the registration of any mark, whatever its character, which had been in continuous use for a certain period previously to the passage of the act. Its analogue is to be found in the statute of Parma in the requirement of a continuous user for ten years, and it was doubtless enacted for the same reason that similar provisions are found in modern statutes, that it is safe to assume that a mark after a period of ten years continuous use serves to identify the origin of the goods to which it is affixed.

These matters were regarded in much the same way in France, Italy, Germany and England.²⁵ Many ordinances in regard to marks are found in the guild statutes of Lübeck. In the statute of the cross bow makers of 1425:—"Every cross bow maker shall place his mark upon the bow of each cross bow that he makes in token that he has done and will do his work in a proper manner." The guild statute of the bakers of 1547 required them to mark their bread with a 'sign', 'which shall continue to be the property of the house, so long as it is continued as a bakery.' This act further provided for registration of the marks in a book as public notice of ownership. This statute clearly recognizes the distinction between personal and

²⁵ Stat. 4 Edw. IV. c. 1. I Rich. III. c. 8. (II. Statutes of the Realm, p. 404, 486. The marks here referred to were signs of police regulation).

local marks in the provision that as the business belongs to the house and is transferred with it, so the mark belongs to the business, and passes to successors.²⁶ This is the present law on the subject.

"When the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer."²⁷

The ordinances of the City of Strassburg of 1475 contain the following:—"Every weaver shall weave his mill mark into his cloth, according to ancient custom;" the fustian inspection ordinances of 1537:—"No dyer shall bring cloth for inspection without placing thereon his mark, under penalty of a fine * * * that it may always be known who dyed each piece";—"whoever shall remove a mark shall forfeit the goods to the city and shall also be punished," and the linsey-woolsey inspection ordinance of 1616, "Every master who makes linsey-woolsey shall bring the same to be inspected, marked with his own mark and no other, under penalty of a fine."

As a rule, a master, on becoming such, was required to choose a mark. This mark he was obliged to use on all his goods, and to retain all his life. The marking of goods with this mark was neither optional, nor a mere right, but was an obligation to his guild; it was a part of his duty to the community, demanded by the strict social order of the craft guilds of the Middle Ages.²⁸

There is a curious parallel between the marks of artisans and traders during the Middle Ages, and the heraldic devices in use at the same time. When knights were cased in plate and fought with vizors down, features were concealed and some method of distinguishing the individual in battle or in the lists was imperative. Thus leaders for purposes of identification adopted characteristic devices by which they could be recognized. These devices, originally badges of personal identification, later became hereditary. The analogy between the heraldic device as originally employed and trade marks is exact. Both are identifying symbols.

Just as traders have controversies over the right to use particular

²⁶ Kohler, pp. 46, 47, 48.

²⁷ Mr. Justice Field, in *Kidd v. Johnson*, 100 U. S. 617.

trade marks and brands, the knights had their disputes over the right to use their various devices. Accounts of cases of heraldic infringement are of frequent occurrence in the old chronicles and books on Heraldry. One of the earliest, that between Bryan de Fitz Aleyne and Hue Poyntz, is spoken of in the roll of Caerlavrock. The most celebrated is the one which occurred in 1384 between Sir Richard Scrope of Bolton and Sir Robert Grosvenor, over the right to bear the arms, "azure a bend or." This controversy might well have been a modern case of trade mark infringement as far as the method of procedure is concerned. It was asserted by the complainant that the use of this device by the defendant caused confusion and mistake. The parties appeared before the Earl Marshal and produced witnesses to prove priority of use. Some of the greatest men in England, among them John of Gaunt and Geoffrey Chaucer, testified on one side or the other. The case was decided in favor of Scrope and Grosvenor was enjoined from using the device. This particular dispute has attracted more attention than the others on account of Chaucer's connection with it. In fact about all that is really known of the date of Chaucer's birth is derived from the deposition that he gave in this controversy.²⁸

The danger resulting from confusion by the use of similar coats of arms was a very real one. It has been said that the battle of Barnet was lost because of the similarity between the royal device, a sun, and that of John de Vere, Earl of Oxford, a star with streamers. Warwick charged Oxford mistaking him for the King.

The extent of the use of trade marks is an accurate index of commercial conditions. When trading was face to face, the purchaser of a commodity dealing directly with the producer, a trade mark was not used because none was necessary. The purchaser necessarily knew whose product he bought. The minute, however, that a particular maker, by the excellence of his manufacture, acquired a reputation outside of his immediate locality, in order to visualize and perpetuate that reputation, he adopted and used a mark to distinguish his product from others. When the eye salves of the Roman oculists became famous, and were sent all over the known world, trade marks were placed upon them. When the tapestries of the Brussels makers were sold abroad, marks were adopted. The importance of any industry and the quality of the goods it produces can pretty accurately be gauged by the extent to which trade marks are used in the industry and on the goods. For,

²⁸ *Encyclopaedia Britannica* Titles "Heraldry," and "Chaucer," *Life of Chaucer* by Sir Harris Nicholas and memoir by the same author prefixed to the works of Chaucer in the Aldine Edition of the *British Poets*. Godwin *Life of Chaucer*, Vol. I, p. 21.

if the market is at all extensive, and the goods are sold generally, a means of identification to the ultimate purchaser is essential, and unless the quality of the product is good, no producer cares to identify it as his.

It is curious that most of the provisions of our modern trade mark statutes and many of the common law rules on the subject are to be found in surprisingly similar form in the mediaeval guild regulations, municipal ordinances and royal decrees.²⁹

It is certain that there was no knowledge of these provisions on the part of modern legislators and judges and their reappearance can only be accounted for on the theory that similar commercial conditions have necessitated similar measures of protection.

Trade mark recognition and protection in modern times can be said to begin in England only as late as 1783.³⁰ And adequate relief against infringement was not granted by the English Courts until 1838.³¹

There seems to have been some demand for protection in the

²⁹ Lucien-Brun (Introduction) comments on the parallels between modern French and Mediaeval law and conditions as follows: "At any rate, during the Middle Ages, and up to the time of the Revolution, we find that marks were in general use, as is proved by Dupineau in his 'Customs of the Duchy of Anjou' (Vol. II, p. 805); and Braun, in his 'Treatise on Trademarks' (p. 23) shows clearly that besides the public mark, that is, the mark of the trade guild or corporation, a sort of stamp of authenticity, there was the private mark, the mark adopted by the individual workman, to distinguish his products from those of others of the same corporation. This was the case not only with manufacturers, but with merchants, and M. Braun cites, upon this point, commercial registers of Dantzic dating from 1420, and of Frankfort, from 1556, and a work by the German jurist Gottlieb Struvius entitled 'Systema Jurisprudentiae Opificariae' (System of Industrial Jurisprudence), which sets forth most of the ideas which are still in vogue. The general rules were almost the same then as now."

³⁰ *Southern v. How*, Popham 144, Cro. Jac. 471, 2 Rolle, 28, can hardly be said to be a trade mark case in the modern sense. It was an action on the case for deceit in the Court of Common Pleas in the reign of Queen Elizabeth. It was held that an action would lie against a clothier who had applied another's mark to his own inferior cloth. Popham says that the action was brought by the defrauded clothier; Croke by the purchaser, but Rolle states that this was not mentioned, but conjectures that it was by the purchaser. See Cox Manual of Trade Mark Cases, I, Upton on Trade Marks, pp. 10, 11, 12, Comyn's Digest, "Action on the Case for Deceit." In *Blanchard v. Hill*, (1742), 2 Atk. 484, Lord Hardwicke said: "Every particular trader has some particular mark or stamp, but I do not know of any instance of granting an injunction here to restrain one trader from using the same mark with another and I think it would be of mischievous consequence to do it. * * * An objection has been made that the defendant in using this mark prejudices the plaintiff by taking away his customers. But there is no more weight in this than there would be in an objection to one inn-keeper setting up the same sign with another." In *Singleton v. Bolton*, (1783), 3 Doug. 293, the judicial conscience had been sufficiently awakened for Lord Mansfield to announce, "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie." This is the first distinct recognition by an English court of the modern doctrine.

³¹ *Millington v. Fox*, 3 Myl. & Cr. 338, 40 Full Reprint, 956; *Sykes v. Sykes* (1824), 3 B. & C. 541, was an action at law.

United States at a comparatively early date. Samuel Breck, a sail cloth maker of Boston petitioned congress to be allowed to register his trade mark. The matter was referred to Jefferson, then secretary of state, who reported as follows:

“December 9, 1791.

The Secretary of State, to whom was referred by the House of Representatives the petition of Samuel Breck and others, proprietors of a sail-cloth manufactory in Boston, praying that they may have the exclusive privilege of using particular marks for designating the sail-cloth of their manufactory, has had the same under consideration and thereupon

Reports, That it would, in his opinion, contribute to fidelity in the execution of manufacturers, to secure to every manufactory, an exclusive right to some mark on its wares, proper to itself.

That this should be done by general laws, extending equal rights to every case to which the authority of the Legislature should be competent.

That these cases are of divided jurisdiction: Manufactures made and consumed within a State being subject to State legislation, while those which are exported to foreign nations, or to another State, or into the Indian Territory, are alone within the legislation of the General Government.

That it will, therefore, be reasonable for the General Government to provide in this behalf by law for those cases of manufacture generally, and those only which relate to commerce with foreign nations, and among the several States, and with the Indian Tribes.

And that this may be done by permitting the owner of every manufactory to enter in the record of the court of the district wherein his manufactory is, the name with which he chooses to mark or designate his wares, and rendering it penal to others to put the same mark on any other wares.”³²

It is evident that there was not a sufficient demand at the time of Jefferson's report or for seventy-nine years afterwards for a law to put into effect his recommendations and it was not until 1905 that they were fully carried out. Laws requiring the marking of certain goods, e. g., tobacco, flour, pork, etc., before sale or shipment, existed in the Colonies and were continued by the States after the adoption of the Constitution, but no State law was enacted “to prevent fraud in the use of false stamps and labels,” i. e., marks used

³² Jefferson's Complete Works, Vol. 7, p. 563, Washington 1854.

in trade, until 1845, in New York. State laws under different titles but all looking toward the protection of the public by means of the regulation of marks on goods were passed in Connecticut in 1847; Pennsylvania, 1847; Massachusetts, 1850; Ohio, 1859; Iowa, 1860; Michigan, 1863; Oregon, 1864; Nevada, 1865; Kansas, 1866; Maine, 1866; Missouri, 1866.³³

These were all the State statutes on the subject of optional marks used in commerce within the State making the law until the national law of 1870.³⁴

In the preface of his *Treatise on the law of Trademarks* (Albany, N. Y., 1860), Francis H. Upton says that no other book had previously been published on the subject. The next book was Cox's *American Trade Mark Cases* (Cincinnati, 1871), purporting to publish in chronological order nearly all the trade-mark cases tried in this country in the civil courts. The first American trade mark case proper to be reported was decided in the year 1837.³⁵ This was followed by one case in each of the years 1844, 1846, 1847, 1848, two in the year 1849, one in the year 1850, one in 1851, one in 1853, three in 1854, two in 1855, three in 1856, six in 1857, one in 1859, six in 1860, one in 1861, and two in 1862, one in 1863, and one in 1864, three in 1865, seven in 1867, seven in 1868, four in 1869, and three in 1870, making a total of 62, with which were included five others about newspaper names, four about hotel names, and others about names of stores and the like.³⁶

It has only been since about 1890 that the cases began to be at all numerous. For the last few years (1907-8-9) the number of reported cases in this country has been approximately one hundred annually. For every case that gets into the books there must be at least a hundred others that do not. No account is here taken of the great

³³ Report of Commissioners appointed to revise the Statutes relating to patents, trade and other marks and trade and commercial names, under act of Congress, Jan. 4, 1898, Washington 1900, p. 59. There are in nearly all of the States at the present time statutes permitting the registration of "labels, trade marks, terms, designs, devices and forms of advertisement" in the office of the respective secretaries of state, and protecting them against infringement. For the text of these acts, see Appendix H to Hopkins on Trade Marks, Second Edition, Chicago 1905.

³⁴ Held unconstitutional in *Trade Mark Cases*, 100 U. S. 82. This was followed by the act of March 3, 1881 supplemented by that of Aug. 5, 1882, superseded by act of February 20, 1905. Amended May 4, 1906. (U. S. Compiled Statutes Supplement 1907, pp. 1008 et seq.)

³⁵ *Thomson v. Winchester*, 19 Pick. 214, opinion by Chief Justice Shaw; *Snowden v. Noah*, Hopkins Chancery 347, was decided in 1825, but was a newspaper name case and did not, strictly speaking, involve a trade mark.

³⁶ Report of Commissioners etc. Washington 1900, p. 59.

³⁷ Report of Commissioner of Patents for the year 1909, 151 Official Gazette 734.

³⁸ Boswell's Johnson, Temple Edition, Vol. V, p. 238.

number of interferences, opposition and cancellation proceedings involving trade marks in the Patent Office.

The increase of litigation is the result of the increased use of trade marks, brands and other identifying indicia in present day business, which is directly traceable to the more extended distribution of products and this in turn is either the cause or the effect of modern advertising. The greatly increased number of trade marks that are registered is significant. The first complete year that the Federal Trade Mark Act of 1870 was in operation there were registered under it in the Patent Office four hundred and ninety-one trade marks; during the corresponding period, under the Act of 1881, there were nine hundred and forty-seven registrations; and under the act of 1905, during the first full year of its operation (the year 1906), ten thousand five hundred and sixty-eight trade marks were registered.³⁷

The subject is daily growing in importance and the interests involved are becoming more and more valuable. A well-known brand, trade mark or label is now-a-days the most valuable asset that a trader can possess.

Boswell says that when the sale of Thrall's Brewery was going forward, Dr. Johnson, who was one of the executors, appeared bustling about, with an ink horn and pen in his button-hole, like an excise man; and on being asked what he really considered to be the value of the property which was to be disposed of answered, "We are not here to sell a parcel of boilers and vats but the potentiality of growing rich beyond the dreams of avarice."³⁸

The "Great Cham" was right. The good will of a business is often of greater value than all the tangible property, and a trade mark is nothing but good will symbolized.

EDWARD S. ROGERS.

CHICAGO, ILL.